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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

R. CHARLES ROBB, PETITIONER,

v.

THE MISSISSIPPI BAR, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

R. Charles Robb,
Pro Se

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29 pp

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QUESTIONS PRESENTED

1. In attorney disciplinary matters, may a state court of last resort exercise its "exclusive and inherent" jurisdiction to supersede the jurisdictional predicate required by its disciplinary rules for bar appeals in order to obtain subject matter jurisdiction of such appeals?

The bar did not allege nor are there minutes of the bar commissioners that reflect that the board found the hearing tribunal's findings and decision to have been outside certain standards and that its general counsel should perfect an appeal. **R. Discip. Miss. Bar, Proc. R.9(1)**. The attorney raised the jurisdiction question before the court in his motion for rehearing. The Mississippi Supreme Court has departed from the requirements of establishing subject matter jurisdiction when the question is raised and abandoned the bright line drawn by the Fifth Circuit Court of Appeals requiring courts to comply with their own rules.

2. Does the Due Process Clause require a higher level of constitutional scrutiny when a state court of last resort enhances attorney discipline after reviewing the appeal *de novo* by way of a self-assertion to not be bound to its standards of review of lower court decisions or of administrative decisions?

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THE MISSISSIPPI BAR, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

The petitioner R. Charles Robb respectfully prays that a writ of certiorari issue to review the **Decision** and **Order Of Suspension** of the Supreme Court of Mississippi, the denial of a timely filed **Motion For Rehearing** thereon having been entered in the above-entitled proceeding on September 19, 1996.

OPINIONS BELOW

The final **Decision** and **Order of Suspension** of the Supreme Court of Mississippi is not reported. (App.,**infra**, 1a-17a) The **Decision** and **Order of Suspension** became final on September 19, 1996, and is evidenced by a letter from the Clerk of the Supreme Court of Mississippi. (App.,**infra**, 27a-28a) The **Opinion** and **Judgment** of the Complaint Tribunal of the Supreme Court of Mississippi, dated August 25, 1993, is not reported. (App.,**infra**, 19a-27a)

JURISDICTION

As grounds upon which this Court has jurisdiction, R. Charles Robb would show that the final **Decision** and **Order of Suspension** of the Supreme Court of Mississippi, dated June 20, 1996, was entered without the requisite subject matter jurisdiction of that court to hear the appeal of The Mississippi Bar and was a denial of Mr. Robb's procedural due process rights afforded him by the Fifth and Fourteenth Amendments of the **Constitution of the United States of America**.

The jurisdiction of this Honorable Court to review the judgment of a state court of last resort is invoked under 28 U.S.C. §1257(a) and 2101(c) and is submitted for consideration pursuant to Rule 10.1(b) of this Court where a state court of last resort has decided a federal law question in a way that conflicts with the decision of a United States Court of Appeals and pursuant to Rule 10.1(c) of this Court where a state court of last resort has decided a federal law question in a way that conflicts with applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS AND STATE DISCIPLINARY RULES

Fifth Amendment, **The Constitution of the United States of America**:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Fourteenth Amendment, **The Constitution of the United States of America**:

"[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rules of Discipline For The Mississippi Bar

Rule 9. Appeals

(a) Either the Bar or the accused attorney may, as a matter of right, appeal any final disposition of the Tribunal to the Court. . . .

Procedure (9.1) Who May Take an Appeal. Either the Board or the attorney may appeal a final disposition of the Tribunal. The Board of Commissioners of the Bar shall determine whether General Counsel shall take an appeal on behalf of the Bar. The Board of Bar Commissioners may direct General Counsel to perfect an appeal when the Board believes that the Tribunal's findings and decisions are arbitrary and capricious, not supported by substantial evidence, manifestly wrong, or in error as to a matter of law.

STATEMENT OF THE CASE

The issue before this court is the denial of due process in a *de novo* review proceeding and denial of procedural due process by a state court of last resort during the course of any attorney disciplinary appeal.

Primarily, this Honorable Court is asked to determine the effect of the usurpation of jurisdiction by a state court of last resort upon the procedural due process rights of any attorney in the bar's appeal of a disciplinary case.

If this Honorable Court finds that urisdiction exists when a state court of last resort has not asbided by its own rules, the motivation of the court for enhancing punishment through the *de novo* review process should be reviewed with a higher level of scrutiny.

The petitioner, R. Charles Robb, [Mr. Robb], is a citizen of the United States of America, was admitted to the practice of law in the State of Mississippi in 1979, and at all times material herein has resided

in Warren County, Mississippi, while maintaining law offices in Vicksburg and Jackson, Mississippi.

Mr. Robb represented Dr. Westbrook (she was then in medical school) in an property settlement contempt hearing against Mr. Benefield, who was represented by Mr. Prisock. Mr. Robb and Mr. Prisock had agreed to the hearing date. Mr. Prisock and Mr. Benefield did not appear at the hearing. The chancery court entered an **Order Of Civil Contempt** against Mr. Benefield, with a provision to purge himself. Mr. Robb prepared the **Order** and presented it to the court without sending Mr. Prisock a copy for approval as to form only.

Mr. Benefield was arrested on the court's **Order** and paid $10,000 to purge himself. Mr. Benefield filed a **Motion** to set aside the contempt **Order**. The chancery court appointed a special master who, after a hearing, issued a **Special Master's Report.** (App. 29a-32a) The chancery court adopted the **Report** and issued an **Order** setting aside the prior contempt **Order.** Neither the **Report** nor **Order** stated a legal basis for setting aside the contempt order.

During the time for appeal of the **Order** setting aside the contempt order, Dr. Westbrook discharged Mr. Robb and retained new counsel. No appeal was taken of that **Order**.

On a complaint filed by Mr. Benefield, a **Formal Complaint** was filed against Mr. Robb by General Counsel for The Mississippi Bar [Bar] on August 19, 1992. (R. 1) The basis of the **Formal Complaint** was that Mr. Robb did not send Mr. Prisock a copy of the proposed order allegedly required by the **Mississippi Uniform Chancery Court Rules**, "concealed" the existence of the contempt **Order** by not disclosing its existence to Mr. Prisock during the next four (4) months, and lured Mr. Benefield (with his counsel) to a deposition and there caused Mr. Benefield to be arrested. No claim was made nor has any court found that the **Order for Civil Contempt** was invalid or

obtained in violation of any rule of court or rule of professional responsibility.

The **Formal Complaint** charged that Mr. Robb violated certain provisions of the **Mississippi Rules Of Professional Conduct** of The Mississippi Bar. (R. 5 and App. 34a)

The Complaint Tribunal [Tribunal] rendered an **Opinion** and **Judgment**. (App. 19a-27a) On August 25, 1993, the Tribunal's **Opinion and Judgment** was timely filed with the Supreme Court of Mississippi. The **Judgment** of the Tribunal was that Mr. Robb had violated some of the rules charged by the Bar, had not violated one, and the violation of one, though technical, would not subject him to discipline. The Tribunal disciplined Mr. Robb by public reprimand.

After the Bar filed a **Notice of Appeal**, Mr. Robb filed his **Notice of Appeal**. The Bar briefed the issues. Mr. Robb filed a **Motion To Strike** the findings of the special master against Mr. Robb's actions in the contempt case.

The court passed the **Motion** to strike until its decision on the merits of the case. Mr. Robb argued in his **Motion to Strike** that as a proximate result of his subsequent discharge as Dr. Westbrook's counsel, he had no substantive nor procedural due process rights to confront the **Report** and **Order**, each of which were entered without any conclusions of law.

Mr. Robb filed his brief contemporaneously with the filing of his **Motion to Strike**.

At oral argument, the court questioned whether Dr. Westbrook had been harmed by Mr. Robb's suit against her. Such issue had not been raised by the Bar before the Tribunal nor briefed to the court. No evidence in support of or defense thereto had been admitted at the trial level of the disciplinary proceedings. The court demanded that the county court's file in Mr. Robb's suit against Dr. Westbrook be delivered to the court by a date certain. Mr. Robb submitted the requested

documents and filed a **Motion For Leave To Respond To The Court's Supplement To The Record**. (App. 37a-39a) The **Motion** set forth that addition of evidence to the record by the court is outside the **Mississippi Rules of Appellate Procedure** and the **Rules Of Discipline for the Mississippi Bar**. Mr. Robb argued that the fundamental fairness doctrine should allow him to respond to the supplementation of evidence for mitigation. (App. 38a) The **Order** of the court "summarily denied" that **Motion**.

On June 20, 1996, the Mississippi Supreme Court rendered a **Decision.** Without any evidence of record to support its findings, the court found that Dr. Westbrook "lost her claim" for arrearage and future property settlement payments "as a result of the lower court's finding that Mr. Robb's effort to execute on the contempt order were improper."

In its **Decision**, the court denied Mr. Robb's **Motion** to strike.

On June 20, 1996, the Mississippi Supreme Court, contrary to its own **Rules**, entered an **Order of Suspension** for six (6) months effective eleven (11) days later. The time for filing a **Petition for Rehearing** did not run until eighteen (18) days after the **Decision** and **Order** were rendered [holidays and weekends extended the 14-day rule].

In civil cases before the court, the filing of a petition for rehearing stays the **Order** and issuance of a **Mandate**. Mr. Robb filed a **Motion To Stay Order Of Suspension And The Issuance Of A Mandate Pending A Decision On Petition For Rehearing**. (App. 39a-45a). The court denied that **Motion**, but never issued a **Mandate**.

Mr. Robb timely filed his **Motion For Rehearing**, which included the issues of jurisdiction and denial of procedural due process now brought before this Honorable Court. (App. 46a-51a).

By letter dated September 19, 1996, from the Clerk of the Supreme Court of Mississippi, Mr. Robb was noticed that his **Motion For Rehearing** was denied. (App. 28a-29a) The court never entered an

Order which denied a rehearing nor addressed the issues raised therein and for which an appeal to this Honorable Court is made.

Mr. Robb files this appeal within ninety (90) days of said clerk's letter. Mr. Robb suspended his practice of law July 1, 1996, notwithstanding the pendency of his **Motion For Rehearing**. This **Petition** is directly from the state court decision.

Reasons For Granting The Writ

The Mississippi Supreme Court has decided an important question of federal law in a way that conflicts with applicable decisions of this Court and conflicts with a decision of the Fifth Circuit Court of Appeals, **In The Matter of Thalheim**, 853 F.2d 383 (CA5 1988) concerning violations of procedural due process. This departure from the requirements that subject matter jurisdiction be established when called upon by a party or the courtm implies that the Mississippi Supreme Court considers its "exclusive and inherent" jurisdiction to be sufficient to grant it subject matter jurisdiction, notwithstanding its disciplinary rule to the contrary.

A decision by this Honorable Court to correct the administration of the law by one state court of last resort safeguards for all attorneys and bar associations, as well as other administrative agencies, a definitive standard of jurisdiction in disciplinary matters.

This Honorable Court should exercise its power of supervision and review where a state court of last resort departs from the accepted and usual course of judicial proceedings by exercising jurisdiction outside its procedural rules and denying the attorney procedural due process rights in *de novo* review of a disciplinary case.

The error concerns an important constitutional, jurisdictional and procedural problem in similar jurisdictional situations which are likely to arise in attorney and other disciplinary matters.

The statutory jurisdictional ground is 28 U.S.C. §2101 (c) and §2101 (c).

I.

Supreme Court Of Mississippi Usurped Subject Matter Jurisdiction Of Bar Appeal

At issue is whether General Counsel had authority to effect an appeal for the Bar. Without such authority, the court had no jurisdiction to consider the Bar's appeal.

Insufficient Predicate For Jurisdiction

In his **Motion for Rehearing** to the Mississippi Supreme Court, Mr. Robb raised for the first time that there had been no evidentiary predicate laid by the Bar to establish that the court had jurisdiction of the Bar's appeal. The question of jurisdiction may be raised at any time. **City of Gainesville v. Brown-Crummer In v. Co.**, 27 U.S. 54, 59, certiorari denied 280 U.S. 569 (1928); **Matson Nav. Co. v. U.S.**, 284 U.S. 352 (1932). The Mississippi Supreme Court has likewise long recognized that the question of jurisdiction may be raised at anytime. **Green v. Creighton**, 10 Smedes & M (18 Miss.) 159, 48 Am.Dec. 742 (1848) and **Hunt v. Hunt**, 629 So.2d 548, 551 on rehearing (Miss. 1993). The court may at any time, *sua sponte*, question its jurisdiction to rule. **Mansfield, Coldwater & Lake Michigan Railway v. Swan**, 111 U.S. 379, 382 (1884). *See Also*, **Michael v. Michael**, 650 So. 2d 469, 471 (Miss. 1995) (court requires that it note its own lack of jurisdiction); **May v. V.F.W. Post #2539**, 577 So. 2d 372, 374 (Miss. 1991) (court is duty bound to take cognizance of its own jurisdiction or lack thereof).

The court denied the **Motion** without comment.

The required predicate for the Bar to appeal is set forth in the **Rules of Discipline for the Mississippi State Bar [Disciplinary Rules]**. [1] The Board of Commissioners is an agency established by the

court and the state legislature for administering the court's disciplinary jurisdiction and speaks through its minutes. (App. 35a and 36a- 37a)

The procedural rule first requires that before the Board makes a decision to appeal, it must "believe" that the hearing tribunal's *findings and decision* are arbitrary and capricious, or not supported by substantial evidence, or manifestly wrong, or in error as to a matter of law.

To "believe" is to make a decision concerning a matter. To make a decision, the Board must have a meeting and minutes thereof.

The brief of the Bar did not state that a decision concerning the tribunal's findings and decision had been made by the Board. Neither did it attach to its **Notice of Appeal** minutes of the Board concerning that matter.

After the Board makes a decision that the Tribunal's *findings and decisions* do not meet the standard set forth by the procedural rule, its General Counsel cannot take the appeal without the direction of the Board. A determination by the Board is mandatory not discretionary.

The brief of the Bar did not state that a decision to appeal had been made by the Board. Neither did it attach to its **Notice of Appeal** minutes of the Board wherein a decision to appeal was made.

General Counsel serves at the behest of the Board of Commissioners of the Bar. The **Disciplinary Rules** control General Counsel's authority to file the appeal on behalf of the Board of Commissioners of the Bar. The Mississippi Supreme Court instituted the **Disciplinary Rules** and determined that "matters pertaining to attorney discipline . . . and such proceedings shall be conducted in accordance with these rules" (Rule 1). (App. 35a) *See also*, **Mississippi State Bar v. Attorney L,**

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[1] **RULE 9. APPEALS** . . . Procedure (9.1) . . . The Board of Commissioners of the Bar shall determine whether General Counsel shall take an appeal on behalf of the Bar. The Board of Bar Commissioners may direct General Counsel to perfect an appeal when the Board believes that the Tribunal's findings and decisions are arbitrary and capricious, not supported by substantial evidence, manifestly wrong, or in error as to a matter of law.

511 So.2d 119, 122 (Miss. 1987). Further, the right of appeal is limited to the Board of Commissioners of the Bar, not General Counsel. As counsel for his client, General Counsel may only take such actions as the client may authorize. The court does not acquire jurisdiction of an appellant [and likewise his cause] when an unauthorized person appeals a decision for such appellant who has not consented thereto. **City of Natchez v. Craig,** 3 So. 2d 837, 839 (Miss. 1941).

The purpose of General Counsel's authorization appears to be self-evident. The decision making is by attorneys elected at large to the Board (App. 35a-36a) and who are less likely to personalize the decision of the tribunal or against the attorney being or not being disciplined. Whereas General Counsel, who is more closely associated with the case, facts and personalities, potentially could allow personal reasons to appeal or not. Whether intended to or not, the procedure complies with the due process standards set forth by this Honorable Court to avoid a potential for vindictiveness on the part of the prosecutor. *See* **North Carolina v. Pearce**, 395 U.S. 711, 724-26 (1969) ; **Colten v. Commonwealth of Kentucky**, 407 U.S. 104, 116-118 (1972); **Chaffin v. Stynchcombe**, 412 U.S. 17, 25-27 (1973); **Blackledge v. Perry**, 417 U.S. 21, 27-28 (1974).

General Counsel had adequate opportunity to produce the minutes of the Board establishing its compliance with the rule and procedure of the court. Beside being able to present the minutes with either the **Notice of Appeal** or with the **Brief**, he was allowed by the **Mississippi Rules of Appellate Procedure**, Rule 40(a), to produce his response to the **Motion for Rehearing** within seven (7) days of its filing but did not respond. Though no provision of the **Mississippi Rules of Appellate Procedure** provides for such action by the court, the court *sua sponte* invited the Bar to respond out of time but by a time certain. The Bar's response was outside the time allowed by the court.[2]

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[2] Mr. Robb filed a **Motion for Rehearing** on July 8, 1996. The Mississippi Bar

However, the untimely **Response** failed to include the predicate evidence relating to the Board's compliance with Procedural Rule 9.1 of the **Disciplinary Rules** nor evidence which "convey[s] a fair, accurate, and complete account of what transpired [before the Board of Bar Commissioners] with respect to those issues that are the bases of appeal." **Mississippi Rules of Appellate Procedure**, R.10(f). (App. 33a)

The Court struck the Bar's **Response** to the **Motion For Rehearing** and denied the **Motion** without opinion.

In a case strikingly similar to the case at bar is where the Fifth Circuit Court of Appeals found that the United States District Court for the Eastern District of Louisiana

> violated procedural due process by failing to follow its own requirements concerning proper disciplinary procedure when it instituted proceedings with respect to alleged federal infractions despite the attorney's panel recommendations.

In The Matter of Thalheim, 853 F.2d 383, 386 (CA5 1988).

Richard A. Thalheim, Jr. was disciplined by the Louisiana State Bar Association with a three-months suspension for certain negligent conduct. A panel of three attorneys was appointed by the federal district court to investigate possible misconduct in its court by Thalheim. The requisite predicate to a disciplinary proceeding before that district court is a written recommendation therefor by the panel. Notwithstanding that there was no evidence of a written recommendation or lack thereof as to whether disciplinary proceedings were warranted, a disciplinary proceeding was instituted against the attorney. The hearing judge recommended that the attorney be suspended for one-year. A

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response was due July 15, 1996. On July 29, 1996, the court caused its court administrator to notice The Mississippi Bar that it had ten (10) days within which to file a response to the **Motion For Rehearing.** See Appendix ??. Such response was due August 8, 1996, but was not filed until August 9, 1996.

majority of the judges of the Eastern District increased the one-year suspension to two years, without any factual findings or conclusions of law.

As is in the Mississippi **Disciplinary Rules**, that district court's regulatory scheme as it applied to those proceedings is in mandatory terms by use of the word "shall". **Id.** at 387. Because "[a]ttorney disbarment and suspension cases are quasi-criminal in character" , [**Id.** at 388, citing **In re Ruffalo**, 390 U.S. 544, 55 (1968); **Charlton v. Federal Trade Commission**, 543. F.2d 903, 906 (CAD.C. 1976); **Matter of Abrams**, 521 F.2d 1094, 1108 (CA3), cert. denied, 423 U.S. 1038 (1975)],

> the court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the person charged. Moreover, the same principle of construction follows from the fact that it was the court that drafted these rules. The court wrote its own rules; it must abide by them.

Thalheim at 388. *See also,* **The Mississippi Bar v. Attorney G**, 630 So.2d 344, 348 (Miss. 1994); and **Prudential Ins. Co. v. Gleason**, 187 So. 229, 233 (Miss. 1939) (substantial compliance is mandatory where jurisdiction is prescribed by statute).

> [A] district court's inherent power to discipline attorneys who practice before it does not absolve the court from the obligation to follow its own rules which it created in order to implement its exercise of such power.

Thalheim at 399, referencing **United States v. Stoneberger**, 805 F.2d 1391, 1392-93 (CA9 1986) and **Abrams**, 521 F.2d at 1103-05.

In a suspension proceeding appeal, the Mississippi Supreme Court found the Bar did not comply with the disciplinary procedural rule to produce a certified copy of the judgment of conviction for summary

suspension notwithstanding the attorney pled guilty in the lower court proceedings. The court acknowledged that it

> is bound by its own disciplinary rules. Since attorney disbarment and suspension cases are quasi-criminal in character, this Court must construe the rules strictly.

The Mississippi Bar v. Attorney G, 630 So.2d 344, 348 (Miss. 1994)

Also, the Mississippi Supreme Court found

> [a]ttorney disbarment and suspension cases are quasi-criminal in character. Accordingly, the court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the person charged. . . . When a court undertakes to sanction an attorney for violating court rules, it is incumbent upon the sanctioning court to observe scrupulously its own disciplinary procedures. . . . [A]ttorneys have the right to rely upon the rules.

Attorney G at 348 *citing* **Thalheim** at 388 and 390.

The Mississippi Supreme Court has denied Mr. Robb procedural due process in not dismissing the Bar's appeal for lack of subject matter jurisdiction on the ground that there was no evidence to establish that the appeal was predicated upon mandatory actions by the Board of Commissioners of the Bar.

II.

Unfettered *De Novo* Review Affords No Cognizable Standard Of Review

This Honorable Court is not asked to review *de novo* a hearing tribunal's opinion and judgment but rather to consider the *de novo* procedure of a state court of last resort of such opinion and judgment.

Unfettered review *de novo* by a state court of last resort in attorney disciplinary cases is repugnant to the Due Process Clause.

> In order to assure the absence of [sic] a [retaliatory] motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing procedure. And the factual data upon which the increased sentence is based must be made a part of the record so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.
>
> **North Carolina v. Pearce**, 395 U.S. 711, 724-26 (1969).

Because attorney disciplinary cases are quasi-criminal,[3] due process protections are as rationally applicable to the *de novo* review process of a state court of last resort as they are to a re-sentencing proceeding of a criminal after being convicted on a new trial or trial *de novo* . See also **North Carolina v. Pearce**, 395 U.S. 711, 724-26 (1969); **Colten v Commonwealth of Kentucky**, 407 U.S. 104, 116-118 (1972); **Chaffin v. Stynchcombe**, 412 U.S. 17, 25-27 (1973); **Blackledge v. Perry**, 417 U.S. 21, 27-28 (1974).

Scrutiny

The Complaint Tribunal is an agency of the Mississippi Supreme Court (App. 35a) which holds the evidentiary hearing in attorney disciplinary cases. **Disciplinary Rule** 2(a). "Hearings before Complaint Tribunals shall be as cases in chancery." **Disciplinary Rule** 8(a). (App. 35a-36a) On appeal from the hearing tribunal, the Mississippi Supreme Court exercises inherent and exclusive jurisdiction over attorney disciplinary cases (App. 35a) (as do all state the courts) and reviews *de novo*, without being

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[3] **In re Ruffalo**, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed. 2d 117 (1968)

> bound by the rule applicable to administrative agencies to the effect that their orders must be affirmed, unless they are arbitrary and capricious and are not supported by substantial evidence, or the rule that, as in chancery, the chancellor will not be reversed on the facts unless he is manifestly wrong.
>
> **Disciplinary Procedural Rule** 9.4 (App.36a)

This self-asserted position of a state court of last resort over the disciplinary proceedings and its review, which is outside its standards of review of lower court decisions and of administrative agency decisions, should raise the constitutional level of scrutiny by this Honorable Court of judicial motivation in cases of increased discipline.

At no time in the proceedings before the Mississippi Supreme Court than when the court *added* an issue not before the hearing tribunal was it more evident that *de novo* review fails procedural due process standards. That issue was neither alleged by the Bar nor argued before the hearing tribunal. The deficient nature of *de novo* review to protect procedural due process rights without judicial scrutiny is evidenced by the court's denying Mr. Robb an opportunity to respond to the new evidence.

Minimally, the due process protections afforded by this Honorable Court's ruling in **Pearce, supra.**, should be applicable to any attorney disciplinary case of enhanced punishment. When a state court of last resort enhances discipline, the record should affirmatively show the reasons therefor and the reasons should be based upon objective information concerning the attorney's conduct occurring after the original disciplinary proceeding. *See* **Pearce**, 395 U.S. at 724-26.

No New Conduct

The Mississippi Supreme Court ruled that Mr. Robb 's "acts following the arrest of Benefield . . . must be considered in imposing sanctions." The Facts show only matters occurring before the tribunal

hearing and the tribunal's imposition of discipline. The court did not identify any conduct by Mr. Robb occurring after the disciplinary hearing to support imposition of increased sanctions as required by **Pearce, supra.**

To "substantiate . . . that Mr. Robb should be suspended from the practice of law", the court stated as reasons therefor "his demeanor and attitude before the Court, and his apparent disregard for the rights of others"

There is neither objective information identified of record nor facts stated in the **Decision** to support that Mr. Robb showed disrespect for the court or its proceedings. Neither is there any objective information concerning identifiable conduct on the part of Mr. Robb occurring after the original disciplinary procedure and which showed disregard for the rights of others. **Pearce**, 395 U.S. at 724-26.

Further, the court ruled that Mr. Robb 's "failure to furnish obvious information to counsel opposite and his deceit in arranging the arrest of Benefield merit a suspension from the practice of law." The failure to provide Prisock with a copy of the proposed order of civil contempt as required by the chancery court rule was before the tribunal and addressed in its finding that Mr. Robb violated **Miss.R. Prof. Conduct** 3.4(c). Likewise, the hearing tribunal addressed Mr. Robb 's deceit by finding that he violated **Miss.R. Prof. Conduct** 8.4(c). (App. 21a-22a and 25a)

In neither rule violation did the court cause its reasons for increasing discipline to affirmatively appear nor did it state objective information concerning identifiable conduct on the part of Mr. Robb occurring after the time of the original tribunal's sentencing procedure. **Pearce**, 395 U.S. at 724-26.

Protective Standard

Without any cognizable standard of review, the Mississippi Supreme Court is unrestrained by *de novo* review of attorney disciplinary

cases. The application of the Due Process Clause by this Honorable Court is the only check upon such unrestrained review. The application of the principle requiring the reviewing court to identify post-discipline conduct of the attorney to warrant enhancement of punishment is the correct judicial response.

Accordingly, the **Decision** of the Mississippi Supreme Court was based only upon facts which existed at the time of the tribunal hearing and imposition of discipline. The court's reasons for increased discipline were no different than that of the hearing tribunal. Mr. Robb was denied due process as provided by this Honorable Court's opinion in **North Carolina v. Pearce, supra**.

The above is sufficient for this Honorable Court to reverse the **Decision** of the Mississippi Supreme Court and reinstate the **Opinion** and **Judgment** of the Complaint Tribunal.

CUMULATIVE JUDICIAL ACTION

Mr. Robb also requests this Honorable Court to review the actual procedure followed by the Mississippi Supreme Court and determine whether a state court of last resort's procedure outside its own rules in an attorney disciplinary case denies the attorney procedural due process and bars enhancement of punishment. A review of the actual procedures followed by a state court of last resort is also determinative of motivation by the court in enhancing discipline. The standard of review of the motivation of the sentencing authority is set forth in **North Carolina v. Pearce**, 395 U.S. 711, 724-26 (1969, **Colten v. Commonwealth of Kentucky**, 407 U.S. 104, 116-118 (1972), **Chaffin v. Stynchcombe**, 412 U.S. 17, 25-27 (1973), and **Blackledge v. Perry**, 417 U.S. 21, 27-28 (1974).

Jurisdiction

As previously shown, the Mississippi Supreme Court (notwithstanding the Bar's opportunity and failure to produce the jurisdictional predicate) exercised jurisdiction without addressing by written opinion the issue raised by Mr. Robb as to the lack of jurisdictional predicate required by the court's disciplinary rules and judicial precedent. (App. 46a-51a) The Court usurped jurisdiction and increased the discipline imposed by the hearing tribunal thereby denying Petitioner due process of law.

Evidence

The court used evidence from two lower state court proceedings to make factually incorrect statements, to draw legally erroneous conclusions, and to enhance punishment based upon the statements and conclusions. (App. 7a) *Erroneous* facts are *no* facts. There must be facts to support a conclusion of law. **Moore v. White**, 137 So. 99, 100 (Miss. 1931).

The admission of evidence of one proceeding violated Mr. Robb 's constitutional right to confront the witnesses upon which the evidence was based. (R. 64-68) The evidence of the other proceeding addressed an issue not before the hearing tribunal and was admitted outside the rules of the court, the court's judicial precedent and the ABA disciplinary standards. (App. 37a) It was not until oral argument, that the court added the issue. The addition of issues not before the hearing tribunal is violative of procedural due process where no right to call witnesses or present rebuttal evidence is allowed. **Willner v. Committee on Character and Fitness**, 373 U.S. 96, 103-104 (1963) The court "summarily denied" Mr. Robb 's request to respond to the added issue and evidence.

The court's erroneous findings of fact is the equivalent of taking judicial notice of a fact or the employment of an incorrect legal standard. Judicial fairness and due process require that the parties who will be affected by the taking of such judicial notice must be afforded notice

thereof . **Varnell v. Green**, 512 So. 2d 903, 904 (Miss. 1987); **Eidt v. City of Natchez**, 421 So. 2d 1225, 1231 (Miss. 1982). **See Federal Rules of Evidence** 201(e); **Mississippi Rules of Evidence** 201(e).

Double Punishment

The court made findings of multiple rule violations which are cumulative to the facts and create an enhanced punishment. The legal principle of merger of the general violation into the more specific violation applies in disciplinary cases and bars enhanced punishment. **United States v. Scott**, 987 F.2d 261 (CA5 1993); **United States v. Cheers**, 439 F.2d 1097 (CA5 1971); and **Miles v. State**, 344 So.2d 133 (Miss. 1977).

This cumulative effect is equivalent to double punishment and deprived Mr. Robb of due process afforded by the Fifth and Fourteenth Amendments of the **Constitution of the United States of America** and a denial of equal protection afforded him by the Fourteenth Amendment of the **Constitution of the United States of America**. This issue was raised by Mr. Robb in his motion for rehearing (App. 2a)

Suspension Before Finality Of Decision

The court ordered a **Suspension** to become effective within a period shorter than allowed for a motion for rehearing and denied a motion to stay the suspension pending a decision on a motion for rehearing. The suspension was enhanced from a public reprimand to six months, requiring Mr. Robb to file a petition for reinstatement, thereby extending his suspension for a period in excess of six months until the bar investigates and the court rules on the petition. (App. 18a-19a)

The consistent denial of due process supports the existence of a retaliatory motive within the court and the need for this Honorable Court to apply the safeguards of **Pearce.**

Conclusion

For the above reasons, this petition for certiorari should be granted.

> The privilege of practicing law 'is not "a matter of grace and favor"' [**Willner v. Committee on Character and Fitness**, 373 U.S. 96, 102 (1963)]; on the contrary ... 'an attorney's license to practice [is] a "right" which cannot lightly or capriciously be taken from him.' ... [T]he power to withdraw that right 'ought always be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney.' [**Ex parte Wall**, 107 U.S. 265, 288 (1883)] . . . .
>
> **Thalheim** at 389.

In the case before this Honorable Court, the Mississippi Supreme Court has abandoned the procedural due process restrictions upon it as announced in **Attorney G** and **Thalheim**. The instant case is contrary to the principles of law set by this Court in **Willner** and **Wall**, a decision rendered by the Fifth Circuit Court of Appeals and the protections afforded Mr. Robb by the Fifth and Fourteenth Amendments of the **Constitution of the United States of America**.

The action of the Mississippi Supreme Court represents an erosion of statutory and legal principle and an abuse of its exclusive and inherent power over attorney disciplinary matters.

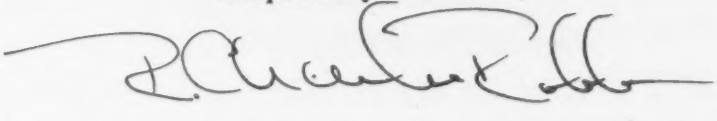
> An attorney disciplinary case
>
> is a quasi-criminal proceeding, wherein an experienced tribunal, consisting of a Circuit Judge and two lawyers appointed by this Court, recommend[s a certain discipline]. The tribunal who hear[s] [the] case [sees] the witnesses, observe[s] their demeanor, [sees] the defendant and his

> demeanor, hear[s] and applie[s] the facts to the law and ma[k]e their decision based on it. [The court] does not. With any other professional group involved in similar proceedings, [the court] ha[s] either affirmed or remanded for further review by their original "tribunal" or hearing agency. [Attorneys] are the only professional group that does not enjoy that privilege. Our constitution requires due process and trial by peers. See Miss. Const. art. III, 14 and 22. In view of the above [the tribunal should be affirmed].

Culpepper v. Mississippi State Bar, 588 So.2d 413, 422 (Miss. 1991), dissent of Justice McRae with Presiding Justice Lee joining.

The remedy in this case where the court did not have subject matter jurisdiction of the bar appeal is a reversal of the **Decision** and **Order of Suspension** and remand for entry of the **Opinion** and **Judgment** of the hearing tribunal. **Ex parte Bradley**, 7 Wall. (74 U.S) 364, 377 (1868); **Ex Parte McCardle**, 7 Wall. (74 U.S) 506, 514 (1868 Miss.); *also* 28 U.S.C. 2106.

Respectfully Submitted,



R. Charles Robb, Pro Se